Judge Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. STEPHEN M. KELLY, SUSAN S. CRANE, WILLIAM J. BICHSEL, ANNE MONTGOMERY, and LYNNE T. GREENWALD, Defendants.	NO. CR10-5586BHS GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANTS' EXPANDED MOTION TO DISMISS CHARGES; AND DEFENDANT MONTGOMERY'S MOTION FOR DISQUALIFICATION OF COUNSEL

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Arlen R. Storm and Brian Werner, Assistant United States Attorneys for said District, hereby files its consolidated response to defendants' motions to dismiss the indictment and defendant Montgomery's motion seeking substitution of counsel.

I. BACKGROUND

A. Procedural Background.

On September 2, 2010, a Federal Grand Jury for the Western District of Washington returned an Indictment charging the defendants with (1) conspiracy, in violation of Title 18, United States Code, Section 371 (count 1); (2) trespassing on Naval Base Kitsap, a United States

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Naval installation, in violation of Title 18, United States Code, Section 1382 (counts 2 and 3); (3) destroying property within the special territorial jurisdiction of the United States, in violation of Title 18, United States Code, Section 1363 (count 4); and (4) committing a depredation against property of the United States having a value in excess of $1,000, in violation of Title 18, United States Code, Section 1361 (count 5). The defendants appeared for arraignment on October 8, 2010.

During the arraignment, after determining that the defendants were entitled to proceed *pro se,* the Court appointed each defendant separate stand-by counsel and set a trial date of December 7, 2010. Additionally, in response to the defendants' request for discovery pursuant to Rule 16, the government notified them that, within 14 days, it would mail the discovery to them and to their stand-by counsel. Later that day, the defendants filed with the Clerk's Office hard copies of the following motions: (1) Motion to Immediately Dismiss Charges, (2) Motion for Discovery, and (3) Motion for Waiver of Conflict.

On October 22, 2010, the government produced discovery. Therein, the government redacted information that was either Classified or Secret.

On October 29, 2010, the defendants filed an "Expanded Motion to Dismiss Charges Because Government Cannot Prove the Essential Elements of Charges Because the Property Allegedly Damaged Conceals Unlawful Weapons of Mass Destruction." In addition, on that same day defendant Anne Montgomery filed a "Motion for Disqualification of Counsel and Appointment of Alternate Counsel."

On November 4, 2010, defendant Susan Crane sent an email to the government demanding that the government un-redact its discovery. Having anticipated this demand, the government currently is preparing a Protection Order seeking authorization to maintain the redactions in the government's discovery. Pursuant to Section 4 of the Classified Information Procedures Act, the government plans to present this pleading to the Court *ex parte* and *under seal.*

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B. Factual Background[1]

During the early morning hours of November 2, 2009, the defendants trespassed onto the Bangor Naval Base. The defendants used bolt cutters to cut open a hole in the chain-link fence surrounding the exterior perimeter of the base, several feet away from a posted sign that warned that access onto the base was prohibited. Upon entering the base through this hole, the defendants, who were wearing all-black clothing, wired the fence back together.

Once on the base, the defendants walked a considerable distance to a protected area (the Main Limited Area, or MLA, of the Strategic Weapons Facility-Pacific (SWF-Pac)) that was surrounded by two additional fences. A sign posted on the outer fence of the MLA warned the defendants that access was prohibited and that lethal force may be used upon entry. Regardless of this warning, the defendants used their bolt cutters to cut though both the inner and outer fences and entered the MLA. There, the defendants briefly displayed a banner bearing a message denouncing nuclear weapons ("Disarm Now Plowshares: Trident: Illegal and Immoral") and performed ceremonial acts, including sprinkling a red liquid on the ground, before they were apprehended and arrested. Ultimately, the five defendants were carried back through the holes they had cut in the two fences and taken to an office where they were processed and interviewed by NCIS and FBI agents.

II. ARGUMENT

In their Expanded Motion, the defendants argue that related defenses of compliance with international law and necessity prohibit their convictions.[2] Therefore, they move to dismiss the charges. In the alternative, they request that the Court enter a pretrial ruling that it will allow the defendants to present evidence regarding the international law and necessity during trial. The Ninth Circuit Court of Appeals has soundly repudiated these purported defenses. Accordingly, they are neither entitled to the dismissal of the charges or to present their purported defenses at

[1] The government notes that the facts largely appear to be uncontested. *See* page three of the defendants' memorandum.

[2] In their prior pleadings, they asserted that the defense of necessity required the Court to dismiss the charges.

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trial.

A. Defendants Are Not Entitled to Dismissal of the Indictment[3]

1. *Defendants' Assertion of International Law or the "Nuremberg Defense" as a Defense to All Charges*

The defendants argue that their actions in violation of domestic law are completely excused, and the indictment should be dismissed, because they were justified by international law, which, they assert, prohibits the construction and deployment of nuclear weapons by the United States. This defense, referred to as the "Nuremberg defense," simply does not apply to nuclear weapon protests, however.

The domestic law of the Nazi regime required citizens to act in ways that advanced the government's violations of international principles. *See United States v. Kabat*, 797 F.2d 580, 590 (8th Cir. 1986). During the Nuremberg trials, some defendants argued that they should not be prosecuted for enforcing the domestic laws. *Id*. The tribunal rejected this argument, holding that the defendants had an obligation to violate domestic law to prevent the country's continuing violations of international law. *Id*. The tribunal specifically noted, however, that

> It would be a great extension of this argument to hold that persons who remained passive, neither aiding nor opposing their government's international violations, were war criminals merely by virtue their citizenship or residence in their given countries.

Id.

Unlike the laws which were the subject of the Nuremberg trials, the laws relating to crimes committed during nuclear protests, including those charged in this case, do not require that defendants act in a way which violates international law. Accordingly, every court to consider the issue has rejected the Nuremberg defense in the context of nuclear weapon protests. *See Kabat*, 797 F.2d at 590; *United States v. Brodhead*, 714 F.Supp 593, 597-598 (D.Mass 1989); *United States v. Montgomery*, 772 F.2d 733, 737 - 738 (11th Cir. 1985) (rejecting Nuremberg defense in case involving defendant Anne Montgomery).

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[3] The dismissal of the charges is premature. Whether or not a defendant is guilty of criminal charges is an issue for a jury. *United States v. Doe*, 63 F.3d 121, 125 (2nd Cir. 1995).

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Even if the defendants' reading of international law was correct, and even if defendants' belief that nuclear weapons were located at Bangor Naval Base was correct, it is still a crime to destroy government property. As the Court in *United States v. Urfer*, 287 F.3d 663, 667 (7th Cir. 2002), noted that "[e]ven if it were contrary to international law for a nation to possess nuclear weapons, domestic law could properly and does make it a crime to 'correct a violation of international law by destroying government property.'" *Id.* at 667 (citing *United States v. Allen*, 760 F.2d at 453). Likewise, in *Allen*, the Court noted that while it did "not suggest that the deployment of nuclear armament systems does violate international law," even if it did "Congress has the power to protect government property by statute." *Id*. at 454. Accordingly, international law fails to provide the defendants with any defense in this case. *Urfer*, 287 F.3d at 667; *Allen*, 760 F.2d at 454. *See also United States v. May*, 622 F.2d 1000, 1009-1010 (9th Cir. 1980) (rejecting international law defense).

2. *Defendants' Assertion of Necessity Defense as Defense to All Charges*

The defendants also argue that their actions are excused, and the indictment should be dismissed, by reason of necessity. That is, they contend that their actions were necessary to avoid what they perceived to be the greater harm of potential nuclear war. The necessity defense, however, is precluded by Ninth Circuit case law.

At common law, the necessity defense "cover[s] the situation where forces beyond the actor's control render[] illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410 (1980). Necessity is established by showing that a defendant (1) acted to prevent an imminent harm, (2) that no reasonable, lawful alternative could prevent that harm, and (3) that the defendant reasonably perceived a direct causal relationship between his actions and the prevention of the harm. *United States v. Dorrell*, 758 F.2d 427, 430-31 (9th Cir. 1985); *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991) (citation omitted).[4] "[T]he mere existence of . . . government policy cannot constitute a legally cognizable harm." *Schoon*, 971 F.2d at 197.

[4] The test for determining availability of the necessity defense is conjunctive. *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989).

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While a law or policy can result in a general harm, an individual lacks standing in such generalized harm. *See United States v. Lowe*, 654 F.2d 562, 566-67 (9th Cir. 1981) (citing *May*, 622 F.2d 1000 (9th Cir. 1980).[5] In addition, the defense is unavailable "if there was a reasonable, legal alternative to violating the law," *Bailey*, 444 U.S. at 410, and "legal alternatives will never be deemed exhausted when the harm can be mitigated by [political action]." *Schoon*, 971 F.2d at 197. *See also Dorrell*, 758 F.2d 432 (opportunities for speech and political participation made the necessity defense unavailable); *United States v. Quilty*, 741 F.2d 1031, 1033 (7th Cir. 1984) (per curiam) (same); *United States v. Cassidy*, 616 F.2d 101 (4th Cir. 1979) (per curiam) (same).

In the present case, the defendants had numerous reasonable, lawful alternatives to their actions, such as participating in the political process or protesting in a legal manner. The defendants' impatience with unsuccessful efforts to alter the United States nuclear policy creates no necessity recognized by the law. For this reason, alone, the necessity defense fails. *Dorrell*, 758 F.2d at 431. In addition, they could not have reasonably believed that their actions would likely alter the government's nuclear policy. Accordingly, the necessity defense fails. *Id*.

3. *Defendants' Application of International Law and Necessity Defenses to Destruction of Property Crimes Charged in Counts 4 and 5 of the Indictment*

The defendants argue at page 20 of their Memorandum that the Indictment should be dismissed because the government cannot prove that they acted "wilfully" as required by Counts 4 and 5 and with "malice" and as required by Count 5 in order to convict them of destroying

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[5] A defendant simply is not entitled to legislate. In a case involving the burning of selective service records, the Seventh Circuit stated

> One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. [Defendants'] professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.

United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 343 (1947).

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property, as charged in Counts 4 and 5 of the Indictment.[6] The government disagrees.

In order to prove that a defendant acted "willfully," the government need prove only that the defendant knew that he was doing something illegal. *See* Comment for Ninth Circuit Pattern Instruction 5.5 (noting that the Ninth Circuit has approved the following wilfulness instruction: "an act is done wilfully if done voluntarily and intentionally with the purpose of violating a known legal duty"). The government need not prove that the defendant was aware of a specific statute that made his conduct illegal. *See United States v. Derington*, 229 F.3d 1243, 1248-49 (9th Cir. 2000).

The government will present sufficient evidence of willfullness in this case. Two of the defendants had previously received barment letters prohibiting them from entering the base. In addition, the defendants expressed their consciousness of guilt, *i.e.*, that they were acting illegally, by attempting to conceal this conduct, including by entering the naval base at night, wearing black clothing, and wiring the fence shut behind them so that no one would notice that they had entered. In addition, the defendants carried living wills with them the night of the offense, thereby recognizing the fact that they were entering an area in which deadly force was authorized. This evidence clearly establishes the defendants' knowledge that they were violating the law, that is, that they were acting wilfully.

As to the issue of malice, in order to prove that a defendant acted "maliciously," the government need prove only that the defendant "acted wrongly and without justification." *See*

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[6] Count 4 of the indictment charges the defendants with Destroying Property within the Special Territorial Jurisdiction of the United States, in violation of Title 18, United States Code, Section 1363. That statute provides, in relevant part, "[w]hoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously destroys or injures or attempts to destroy or injure any structure, conveyance, or other real or personal property, shall be fined under this title or imprisoned not more than five years, or both, and if the building is a dwelling, or the life or any person placed in jeopardy, shall be fined under this title or imprisoned not more than twenty years, or both. 18 U.S.C. § 1363.

Count 5 of the indictment charges the defendants with Depredation of Government Property, in violation of 18 U.S.C. § 1361. That statute provides, in relevant part, "[w]hoever willfully injures or commits depredation against any property of the United States, or of any department or agency thereof . . . shall be punished as follows: If the damage or attempted damage to such property exceeds the sum of $1,000, by fine under this title or imprisonment not more than ten years, or both."

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Ninth Circuit Pattern Instruction 8.1 (defining "malice" as that term is used in 18 U.S.C. 81, Arson Committed within Special Territorial Jurisdiction of United States). *See also United States v. Doe*, 136 F.3d 631, 635 (defining malice as "state of mind which actuates conduct injurious to others without lawful reason, cause or excuse) (quoting *Dean v. State*, 668 P.2d 639, 643 (Wyo. 1983)).

In the present case, as discussed above in the context of wilfulness, the defendants' attempted concealment of their conduct, demonstrates their consciousness of guilt, that is, that they were acting wrongly. In addition, also as discussed above, the defendants had no lawful reason, cause or excuse to commit the offense charged in Count 4. Courts have repudiated both of the defenses they have offered as a legal justification for their conduct. *See Dorrell*, 758 F. 2d 427 (opportunities for speech and political participation made the necessity defense unavailable).

Finally, the defendants argue that the government cannot convict them of the destruction of property charges alleged in Counts 4 and 5, because the government cannot prove that the fences and security system they injured constituted "property." The defendants argue that because the fence and security system they injured were, in the defendants' belief, protecting nuclear weapons, the fence and security system could not constitute property. The defendants are mistaken. The Ninth Circuit has rejected this argument. *See United States v. Komisaruk*, 885 F.2d 490, 497 (9th Cir. 1989). In *Komisaruk*, the defendant was charged with destroying government computers but claimed that her actions were justified by her belief that those computers were used in the Navstar military navigational system. The District Court did not allow Komisaruk to present her "far-fetched" views that the computers did not constitute "property" and the reviewing court affirmed. *Id.* at 493. Similarly, Komarisuk also tried to present evidence that the property's use in connection with the military stripped of its legal designation as property. The appellate court noted that in criminal law, courts must apply the plain and unambiguous meaning of statutory language and that "[t]he district court properly rejected this fanciful argument." *Id*. at 497.

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B. Defendants are not entitled to an *In Limine* Ruling to Allow the Defendants to Present Expert Testimony at Trial Regarding Necessity and Nuremberg Defenses

Rather than issue an order allowing defendants to present evidence on these purported defenses, the Court should issue an order expressly excluding such evidence and argument. It appears that the defendants have manufactured serious crimes and, to date, consumed immense prosecutorial and judicial resources, in hopes that they can turn their trial into what they perceive to be a referendum on United States defense strategy. They are not entitled, and should not be allowed, to do so.

Questions of law, including international law, are for the judge and not the jury. *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996); *Echeverria-Hernandez v. INS*, 923 F.2d 688, 692, *vacated on other grounds,* 946 F.2d 1481 (9th Cir. 1991) (en banc). Accordingly, questions regarding whether the Nuremberg defense is applicable in this case and whether international law prohibits the production or use of nuclear weapons are not questions for the jury to determine after hearing expert testimony - as the defendants propose - but matters for the Court to determine. *See Urfer*, 287 F.3d at 667. In addition, where, as here, the defendants, via an offer of proof, are unable to establish all of the elements of the necessity defense, there claim fails "as a matter of law," *Dorrell*, 758 F.2d at 433, and the Court properly may prohibit testimony regarding the defense and may also refuse to issue a jury instruction relating to it. *Dorrell*, 758 F.2d at 433, 434. *See also United States v. Haynes*, 143 F.3d 1089, 1090 (7th Cir. 1998) ("A judge may, and generally should, block the introduction of evidence supporting a proposed defense unless all of its elements can be established.").

Applying these principles, in cases involving nuclear weapon protests, district courts routinely preclude defendants from offering evidence relating to the Nuremberg defense and the necessity defense. They simply are irrelevant to the issues before the jury and, as a result, tend to confuse instead of illuminate. *See Komisaruk,* 885 F.2d at 492-94, 495 (application of principle that court should prohibit defenses similar to those the defendants wish to bring, in a case similar to this one); *Dorrell*, 758 F.2d at 430 (district court may preclude the defendant

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from arguing a necessity defense at trial where "the evidence, as described in the defendants' offer of proof, is insufficient as a matter of law to support the proffered defense."); *United States v. Maxwell-Anthony*, 129 F.Supp.2d 101 (D. Puerto Rico 2000) (district court prohibited defendants from arguing and presenting expert testimony regarding international law defense or arguing necessity defense at trial for actions related to nuclear protest); *Cassidy*, 616 F.2d 101, 102 (same). *See also United States v. Cottier*, 759 F.2d 760, 763 (9th Cir. 1985); *Lowe*, 654 F.2d at 567. The government requests that the Court preclude such evidence in the present case.

C. Motion for Substitution of Standby Counsel

Defendant Montgomery also moves the Court to replace her standby counsel, Ron Ness, with attorney Blake Kremer. Montgomery asserts that because Ron Ness represented defendant Greenwald's husband in a contentious divorce, Greenwald is having difficulty participating in the joint defense agreement. The government has no objection to this request.

III. CONCLUSION

For the foregoing reasons, the government respectfully requests that the defendants' motion for dismissal of the indictment, and, in the alternative, motion *in limine*, be denied.

DATED this 5th of November, 2010.

Respectfully submitted,
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s/ Arlen R. Storm

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CERTIFICATE OF SERVICE

I hereby certify that, on Nov. 5, 2010, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent electronically to all counsel of record. The document was also e-mailed to the e-mail addresses provided by defendants.

s/ Arlen R. Storm

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